In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 636

WILLIAM H. WOOD, AND MILDRED J. BLUE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying a petition for allowance of an appeal from the Municipal Court of Appeals (Pet. 11) is not reported. The opinion of the Municipal Court of Appeals (Tr. 329) is not reported.

JURISDICTION

The order of the court of appeals was entered on November 1, 1962. By order of the Chief Justice, the time for filing a petition for a writ of certiorari was extended to December 8, 1962. The petition was filed on December 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the fact that an arrest warrant could not be found at the time of appeal establishes that the arrest of petitioners and a search incidental thereto were illegal, although the only testimony adduced at the trial was that the arresting officer had acted under a valid warrant and petitioners did not contend at trial that no arrest warrant existed.

STATUTE INVOLVED

Section 705 of Title 11 of the D.C. Code provides:

> Any judge of the municipal court may at any time, including Sundays and legal holidays, on complaint under oath or actual view, issue warrants returnable to the criminal division against persons accused of crimes and offenses committed in the District of Columbia, and he shall make a record of his proceedings in every case in a book to be kept for that purpose. Such warrants shall be issued free of charge.

STATEMENT

Petitioners were convicted of operating a disorderly house in the District of Columbia and were sentenced to imprisonment for 60 days (Tr. 307). The Municipal Court of Appeals affirmed the convictions (Tr. 329) and the Court of Appeals denied a petition for allowance of an appeal to that court (Pet. 11).

At the trial, neighbors of petitioner Woods' "tourist home" testified that most of the patrons came in cars with local license plates; that they did not carry luggage; that they remained only an hour or two; that the house was frequently noisy all night; and that

whiskey bottles were thrown in the yards of the neighbors (Tr. 6–15, 27–33, 39–48, 79–83, 113, 120–124, 152–156, 174–182). Two police officers testified that on separate occasions on June 22 and June 30, 1961, each, wearing plain clothes and accompanied by a female policewoman in plain clothes, went to the house, was admitted by Miss Blue who asked the time for which the room would be used. When the officer answered that it would be for an hour or an hour and a half, he was told the cost would be $2.58, which he paid in advance. Each of the rooms occupied by the officers contained one bed (Tr. 55–64, 100–1005).

Officer Dixon testified that on June 27, 1961, in the parking lot of the house, he saw only automobiles with D.C. plates except for one with Virginia plates (Tr. 185). On July 1, 1961, he obtained a warrant of arrest which he and others executed at the house about midnight (Tr. 73, 186). The officers found and seized registration cards on a shelf near the registration desk, in a desk in the rear of the establishment, and on a shelf near the kitchen (Tr. 196–197). The government introduced in evidence the registration cards for the period from June 4 to July 1. None of the cards showed a charge of $6.00, the fee for one night. A number of them showed that the rooms had been rented more than once on the same day (Tr. 210–212).

Subsequently, toward the end of the trial, petitioners' counsel moved to suppress the evidence as to the cards (Tr. 228–229), contending that the registration cards were not the instrumentalities of a crime and

were not subject to seizure.' Counsel also said that Officer Dixon had apparently secured the arrest warrant simply on the basis of his observation that only cars with D.C. license plates were parked in the parking lot of the establishment and that this was not sufficient probable cause for issuance of the warrant (Tr. 229–231). The government stated that there had been other evidence to support the warrant which had not been produced since no motion to suppress had been made (Tr. 231–235). The court denied the motion noting that Officer Dixon had testified that his personal observations were not the sole basis for the warrant (Tr. 235).

On appeal petitioners included in the record the supporting affidavit accompanying the request for the arrest warrant; it had been subscribed and sworn to before an assistant United States Attorney by Officer Dixon and a number of other persons (Tr. 322–323). The Municipal Court of Appeals held that the information contained in the affidavit constituted probable cause for the issuance of a warrant of arrest. In response to the argument of petitioners' counsel that the affidavit had not been seen by the judge who issued the warrant, the court held that, in the absence of any proof to the contrary, it would assume that the affidavit had been read and considered in regular course (Tr. 329). In a petition for rehearing, petitioners questioned whether a judge had issued the warrant in compliance with 11 D.C. Code 705 (Tr. 331–336).

ARGUMENT

As we understand petitioners' argument it is that, since the arrest warrant could not be found when the supporting affidavit was included in the record on appeal, this Court should now assume that no judge issued the warrant and that the arrests were illegal, with the result that the incidental search was invalid. This argument presents no issue warranting further review. Officer Dixon testified that he made the arrest under a warrant. (Tr. 186). Petitioners, even though they belatedly moved to suppress the registration cards on other grounds, never claimed at trial that no warrant had been issued, although the government's witnesses testified that petitioners had been arrested under the authority of a warrant. Had any issue been raised as to whether the officer did have a warrant, the facts could then have been explored. However, since no issue was raised, there was no occasion for the government to produce the warrant or warrant book in court,[1] nor, assuming that the warrant had been lost at that time, to produce other evidence that the warrant had been issued. Having thus failed to raise the issue at a time when the facts could have been adduced, petitioner cannot now complain that the facts were not developed at the trial. See *Giordinello* v. *United States*, 357 U.S. 480, 488.

[1] The United States Attorney in his brief below stated that an entry as to the warrant in question does appear in the Warrant Issue book in the Warrant Office of the Municipal Court. At the least, this indicates that the supporting affidavit had been submitted to the court.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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